IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. U.S. DEPARTMENT OF THE INTERIOR, et al., Defendants.	Case No. 3:18-cv-00359-MO June 10, 2019 Portland, Oregon

Oral Argument

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL W. MOSMAN

UNITED STATES DISTRICT COURT CHIEF JUDGE

APPEARANCES

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(P R O C E E D I N G S)

(June 10, 2019; 1:09 p.m.)

THE CLERK: Your Honor, this is the time and place set for oral argument in Case No. 3:18-cv-359-MO, Center for Biological Diversity v. United States Department of Interior, et al.

Counsel, can you introduce yourself for the record.

MR. GLITZENSTEIN: Good afternoon, Your Honor. Eric Glitzenstein on behalf of the plaintiff. And with me at counsel table is Noah Greenwald, who is the science director for the Center for Biological Diversity.

THE COURT: Welcome. Is your microphone on?

MR. GLITZENSTEIN: Yes, it is, Your Honor.

THE COURT: Thank you.

MR. YANG: Good afternoon, Your Honor. Hubert Yang, counsel for the government.

MR. BRUNER: Good afternoon, Your Honor. Aaron Bruner, counsel for defendant intervenors, and this is Caroline Lobdell, co-counsel.

MS. LOBDELL: Good afternoon, Your Honor.

THE COURT: Thank you.

Thank you all for being here and for your helpful briefing in this case. I'd like to lay out my tentative thoughts and let that be sort of a framework for oral argument today. And when I'm done, I'll start with the Center for

Biological Diversity to respond to some of these thoughts.

So I'm going to -- I think what I'll do is lay out my thoughts on the listing before I get to the 4(d) rule, and we'll take those in two separate pieces.

So there are a couple of arguments made by what I'll call CBD with regard to the listing. The first, I'll say, is an argument that the rationale itself suffers from rational and perhaps even -- I don't mean this negatively, but semantic inconsistencies, things that just can't be said that way and still be reasonable.

And so the first of those arguments focuses on the description of the Willamette Valley population as stable but declining. And so my own tentative view, consistent with the answer to that argument raised by the Interior, is that that's a somewhat chopped description of the actual explanation, which is that it's in long-term decline but near-term stability, particularly focusing on the ODFW data.

The second argument -- and again, I should back up and say that we're going to look at this in two pieces because there are two pathways under the ESA for this decision to list as threatened instead of endangered to be successful for plaintiff. One is to show that it's in danger of extinction throughout all of the range, and the other is that it's in danger of extinction or is in danger in a significant part of the range, so those two separate arguments, and the first one

has -- that is, throughout all the range -- has two arguments in that subpart.

The first, as I've said, is that there are these linguistic inconsistencies. One is the one we just talked about, and the other is the idea that it's arbitrary and capricious to treat, as the Forest Service does, the threat of stochastic events to the Willamette Valley population. And the answer to that, as I understand it, is that it's something the Fish and Wildlife Service -- I think I said Forest Service a moment ago -- the Fish and Wildlife Service did take a hard look at. It views them as non-imminent. I'm not sure how one knows that, but it's viewed as non-imminent and was taken into account in the reasoning provided here. So that's argument number one on sort of the first half of this statutory analysis with two subparts.

The next argument on this same idea is that there's a failure here to use the best available science. And that focuses on the use by plaintiff of BBS data, and the argument that that is better data than the survey data relied upon by Fish and Wildlife Service.

Remember here that the argument isn't who has got the best data in some abstract sense, but whether the Fish and Wildlife Service analyzed whether this was data that should be relied upon as the best data or a method that should be relied on as the best science available or not. And here the record

has a careful look at the BBS data by Dr. Sauer -- by the agency, in fact, in terms of saying, well, this is something we should look at, and an explanation as to why it should be discounted. And that would normally satisfy the requirement that the agency take a look at other scientific methods employed for answering the pertinent question, and explain in rational terms why it didn't rely on it in whole or in part.

Plaintiff here, I think, takes it a step further and says that, in fact, it's not that the agency took no look at this data, but it took in some ways too hard a look. And I think the argument, if I understand it correctly, is almost that it demonstrates a determination by the agency to find a way to discount the data.

I'm not sure what to make of that argument, in that I think I accept that at some superficial level the agency took a hard look at this other method for determining population and rationally discounted it, and so whether someone took too hard a look, that's what I want to hear more about at oral argument. I'll call that prong one of the statutory analysis.

The second prong focuses not on all the range or throughout the range, but on whether the species is in danger of extinction or, I'll just say, in danger in a significant portion of its range. And here it gets a little bit tricky on our record. So that really has two prongs to it: is the species in danger of extinction, part one; and part two, in a

significant portion of the range. So risk and significance, you might think of it in those two ways.

Plaintiff's argument is that in terms of determining significance, which is a term of art not defined in the Endangered Species Act, the agency drafted a rule to sort of define "significance." And that rule has been subject to some criticism, including by district courts in the Ninth Circuit. The core of the criticism, cutting to the chase here a little, is that to give the term "significance" the meaning that it's given in the draft rule would eliminate the need for the term "significance" in the statute itself.

So the first question for me is, particularly focusing on the rationale of the in-circuit district court cases on this point, do I agree with that reasoning. And, again, we'll hold oral argument and I'll hear you out, but my tentative view is yes, I tend to agree with the reasoning that would make the draft rule an improper method for determining significance.

So with that in mind, the Fish and Wildlife Service's core argument punts on that question and turns instead to the question of endangerment and says that the Fish and Wildlife Service in this case determined that in this portion of the range, southern Washington and the lower Columbia, that the species was not in danger of extinction.

So if that holds up, it certainly does make it

unnecessary to decide whether the agency adequately determined significance. That wouldn't matter if there was no danger of extinction in whatever portion of the range is being discussed.

Here, on the briefing, the argument turns out to be something about the nature of the record here. So I guess in two parts, first plaintiff says, well, that doesn't make sense analytically. It doesn't make sense because if you determined that there was no danger of extinction, then you, the agency, would have no need to go on to the question of significance, so why would you? You did do that. Why would you do that if you answered a predicate question about danger of extinction? You'd stop there.

I think the agency's answer on the briefing is, well, we were just being thorough. I'm not sure how persuasive that is. I'll be interested in hearing more about that at oral argument.

The second is more record driven, and that is that the plaintiffs point to the draft analysis, in which there is -- or at least there's a claim that there is a finding of danger of extinction, and that that explains that the analysis did go the way plaintiffs claim it went, which is to first find danger of extinction and then not find significance.

And the Fish and Wildlife Service's answer to that on the record is in two parts: one, that plaintiffs are referring to a draft analysis occurring about 18 months prior to the

final analysis, and that the landscape -- that is, the informational landscape -- changed in those 18 months, such that they were able to come to a different conclusion 18 months later. And, in particular, they cite to an altered analysis of sort of the predicted rate of decline.

So I will have, when we get to that point, two questions, among others, for the agency, and that is, one, since that altered analysis of the predicted rate of decline was furnished, I'll say, one month prior to the draft analysis, then how can you explain to me on this record that that's information that wasn't known at the time of the draft analysis and only became known to the agency later, and can fairly be included in this idea that we had a draft analysis, things changed, we learned more information, so the final analysis came out differently.

And the second question is really just a follow-on to that, is what else do you have between the draft analysis and 18 months later with the final analysis that justifies on our record this idea that whatever you said in the draft analysis isn't what you concluded in the final analysis.

Then I'll have a third question on this same point for the agency, and that is your final analysis description doesn't actually utter the words "endangered" or "in danger of extinction," but it comes perilously close. How do you justify the actual language used in the final analysis as supporting

threatened but not requiring a finding of endangered? And I think that gets us to the end of that first section.

So I'll start with CBD.

MR. GLITZENSTEIN: Is your preference that I speak from the podium?

THE COURT: If you're not going to use the podium at all, then just stay seated in your chair there.

MR. GLITZENSTEIN: Thank you, Your Honor.

I appreciate that thorough blueprint and recapitulation of the positions of the parties, and with the Court's permission, what I prefer to do is start with the significant portion of the range issue first and then go to the alternative prong that Your Honor articulated with respect to whether the species is at -- is endangered in all of its range, because I think as Your Honor laid it out -- and plaintiff recognizes that the significant portion of the range issue I think does raise a more straightforward legal issue, not to say that we don't believe that there is strong arguments on the alternative prong for listing, but we also recognize that if the Court has before it a more straightforward matter of statutory interpretation, that may lend itself to a ruling that may or may not make it unnecessary to reach some of the other issues before the Court.

THE COURT: Let's start then with the proposition that I accept the idea that the draft definition for

significance is flawed, that I agree with other district courts who have come to that conclusion, all right? If we start with that, then for the -- for your opponent, the only thing left is to turn to risk, right? That takes -- if your method of analyzing significance is flawed, then that leaves them only one avenue open, right?

MR. GLITZENSTEIN: That's correct, Your Honor. And if I could give you a couple reasons why the argument that they've made, and as Your Honor articulated, that I think what they're suggesting was it was simply an academic exercise that they put in their definition of "significance" in the part of the final decision, which is specifically relating to the significant portion of the range.

I believe that if you actually look at how they constructed their argument, it would be very difficult to actually come to that conclusion, and I think that the best way to do this is by actually turning to, which I'll -- for purposes of the Court, this is Administrative Record pages 631 through 632, which is where the significant portion of the range discussion is.

There was one point I wanted to sort of highlight that I think is very useful, specifically in terms of Your Honor's point going to why did you include this in your final decision if it was not relevant or necessary to the decision, which I think is also sort of a recharacterization of their

harmless error argument, that, well, we put in this test, we're not defending it, other courts have found it to be unlawful, but nonetheless, you could ignore that here because it was really not of critical or dispositive importance to our decision.

I think that one interesting point about that, Your Honor, if you look at -- and I just raise this because it was something that I think goes directly to what you said, which I think helps refute that interpretation of the rule. Before you even get to the significant portion of the range discussion, they have a discussion of another alternative basis for listing, which is called the distinct population segment rationale, and I think there's some allusion to this in the briefs. This would be by way of potentially listing a component of a species but not the entire species or subspecies in this case.

If you look at how they dealt with the distinct population segment issue, which is somewhat analogous to the significant portion of the range analysis, but somewhat different, it looks at significance of proportion but then also has this requirement for discreteness unless the significant portion of the range rationale for listing a population has to be entirely discrete. So hypothetically they would have to look at the Washington portion of the range and say that is genetically or geographically distinct.

If you look at how they analyzed that DPS issue, they basically said we've decided there is no discrete population. So if you look at page 631, or just note 631, they say, "Under our DPS policy, a population must be discrete and significant to qualify as a DPS. Since we have determined that no populations of streaked horned larks are discrete, we will not consider whether the population segment is significant."

That stands in stark contrast to this -- the ensuing analysis of the significant portion of the range issue, where they went through a specific determination as to whether the Washington portion of the range is significant.

And the point I'm making is, among other arguments we're making, that completely undermines any notion that they would include a significance analysis in the -- if I could use the acronym SPR part of the analysis simply as an academic or theoretical exercise. Not only is that not something that agencies generally do, I think as Your Honor may observe from looking at administrative law cases, where agencies rarely just include some analysis that has nothing to do with the decision they have to make, but here we have a situation where we're in a directly analogous situation because they said this one is not discrete, we don't even have to look at significance. They didn't bother to. But in the --

THE COURT: Could I pause you there for just a moment.

So the record cite is a helpful piece of argument because the problem that your argument faces, for me at least, is that it rests on this idea that agencies would not typically engage in this second step of an analysis if the first step makes it unnecessary. And as a point of fact, I don't know one way or the other whether that's true or not. I mean, I may have some experience, but it's limited to a nonscientific sample, and your experience is probably also so limited, if you're just going by your own experience.

So, I mean, it is curious you'd say -- well, based on what would we conclude that agencies don't do that?

MR. GLITZENSTEIN: Well, I don't want to sort of ask the Court to take some judicial notice of that, but what I am saying is in this --

THE COURT: I guess I'm answering your question that if you did ask me, I'd say no because I don't have enough to go on.

MR. GLITZENSTEIN: I appreciate that, Your Honor. I guess the point I was trying to make in this particular case is that here we have an analogous situation where the agency itself, this agency in this particular role said that we don't have to apply the further step because we have decided that it doesn't have to be reached.

THE COURT: Right. Which I said a moment ago was a helpful argument and I appreciate it. It is helpful, but I'm

asking about the argument you actually briefed, which is that agencies just don't do this, they wouldn't behave this way.

And my question for you is how do I know that?

MR. GLITZENSTEIN: Well, I do think, Your Honor, that there's precedent which is helpful on that point. And that is the prejudicial or harmless error cases that we cite, particularly *Gifford Pinchot*, which is an Endangered Species Act case, where the Ninth Circuit has instructed that where an agency has made an error of some kind in its decision-making process -- and here we have what I think is tantamount to a confessed error -- that the agency has a heavy burden of establishing that that -- if it appears to have relied upon that for making its decision, it's difficult for a court to look at that and conclude as a general matter of analysis that that was irrelevant to the agency's decision. So I think if you put this within the box of the prejudicial harmless error case law, I think it helps support that proposition, but --

THE COURT: If I could pause you there before you move on.

Actually, isn't the opposite the case? I mean, if you're gunning for the possibility of harmless error as an agency, then you need a non-error to fall back on. So if you just have one shot at the issue and you get it wrong and you haven't moved on to the next step of the analysis -- I shouldn't even say "next step." To an independent second step

of the analysis, then you got nothing to fall back on if you're found to be in error. It would make sense in that world for an agency, if it has two independent prongs for reaching a decision, to decide both of them in case one is wrong.

MR. GLITZENSTEIN: Well, I think an agency certainly could do that. I think the examples of the cases where the Ninth Circuit has found harmless error have generally been cases where it was absolutely clear on the record that the independent basis was sufficient to support the agency's decision. And I do think that --

THE COURT: Right. And you get no chance at that going your way if you're the agency if you don't even make the decision. It's hard to get the Ninth Circuit to agree that your otherwise independent ground was supported and an adequate basis for your decision, but it's impossible if you don't go that far, right?

MR. GLITZENSTEIN: I agree with that, Your Honor. If an agency says, and the record reflects, here are several independent grounds for our decision, any one of which would be sufficient to support the conclusion, then --

THE COURT: I guess I hear the voice of my father reminding me that you've missed 100 percent of the shots you don't take.

MR. GLITZENSTEIN: I appreciate it. As a basketball fan, I appreciate the analogy, Your Honor.

Here again, I think the most crucial point is that I think in this particular case there are two fundamental record-based problems with the agency's --

THE COURT: One is the one you mentioned a moment ago, right?

MR. GLITZENSTEIN: That's one, and I think actually in addition to that one, I think there are two others.

The second is if you read this significant portion of range discussion in its entirety, my argument I think is that it is really impossible to read it in anything other than the significance part of the analysis was critical to the agency's decision.

The way they lay it out is they explain that we have this approach to defining significance, in which we look at whether or not there are separate portions of a range that can be broken down in some fashion, then we look at whether or not threats are more concentrated in one part than in another part, and if they are, then we decide whether the part where the threat is concentrated is a significant portion.

So applying that analysis, Your Honor, they then basically have it broken down so they first talk about the Washington portion of the range, which they set out in what I think Your Honor appropriately referred to as rather dire terms, talking about declines of 40 percent over a short period of time. Again, the Washington portion has been reduced to

about 300 total birds in the two places they consider to be the Washington portion of the range. They talk about 40 percent declines. They talk about the fact that the species is well likely to become extirpated within 25 years, according to the data. And one of the arguments the government makes on this point is, oh, they're just citing some studies, they're not saying what their conclusion is. But it's clear, and I think I can refer to other parts of the record where they're clearly describing what they believe the record shows about the rather dire state.

Then they go on to the Willamette Valley portion, and they say the Willamette Valley portion -- and however you characterize this from a witnessing standpoint -- is referred to as being more stable. So they have these two populations set out in this kind of seriatim way, and then they conclude with the paragraph which applies the significance test. What they say is, "Having already determined that the streaked horned lark is threatened throughout its range, we considered whether threats may be so concentrated in some portion of its range" --

THE COURT: Can you slow down while you're reading.

MR. GLITZENSTEIN: I'm sorry, Your Honor.

-- "that if that portion were lost, the entire subspecies would be in danger of extinction. In applying this test, we determined that even with the potential loss of the

Washington populations, the relevantly larger population in the Willamette Valley of Oregon would likely persist, therefore the subspecies as a whole is not presently in danger of extinction."

I believe if you apply normal analytical and linguistic analysis to that, it's clearly saying as close as one can reasonably be expecting the agency to say, we are applying the significance test, the now discredited and not supported significance test to determine that because the Willamette Valley population persistence would not render the entire species at risk of extinction, and therefore we decide that the species is not in danger to the significant portion, i.e. the Washington portion. I think that's just clearly what the agency is saying.

THE COURT: I understand that argument.

And then your third one is the one about the language of the draft analysis, right?

MR. GLITZENSTEIN: Well, we have the draft analysis, but what I also ask Your Honor to look at are some other portions of the final decision itself. And if I could just -- because the government in its reply brief, I think it's fair to characterize this as an effort by government counsel, I'd say a Herculean effort to cast the rule in a way that is not supported by what the rule says. In language of administrative law parlance, a post hoc rationalization. They admit there's

no place in the Final Rule where they said the Washington portion is threatened rather than endangered, but there are places where it's about as clear as it could be that they are determining the Washington portion faced imminent risk of extinction.

So, for example, AR-592, which is in the Final Rule, they say again on the Washington coast and Columbia River islands, there are about 120 to 140 breeding larks. Populations at these sites appear to be declining by about 40 percent per year.

Page 601, in response to a comment specifically. about the status of the Washington population, they say, "We do not consider the subspecies in its entirety to be in danger of extinction at this time as we anticipate the persistence of the lark in some portions of its range. We considered whether the Washington population of the lark may constitute a distinct population segment or a significant portion of the range. We concluded that the Washington portion does not constitute a valid DPS, and furthermore that the Washington population does not represent a significant portion of the range of the subspecies." Not that we do not believe the Washington portion is endangered.

Page 615 of the Administrative Record of the Final Rule --

THE COURT: I'm familiar with that.

MR. GLITZENSTEIN: So, Your Honor, I don't mean to belabor the point, but I do believe that Your Honor's characterization of the Final Rule as certainly strongly suggesting a determination of endangered status in -- at page 623 they refer to the population could become extirpated in the near future in the Washington portion. So we believe that any suggestion that this was simply not necessary to their conclusion is simply not supportable by the final decision itself or the other tools that the Court might use to determine whether or not the species should be listed on that basis.

THE COURT: So to recap, to make sure I understand your argument, you're really making two arguments, then. One is the one we discussed; that is, faced with the idea that the agency now says -- this is your argument -- that they really only determined that the species was only threatened and therefore did not have to determine significant, you point to several reasons why that's, in your view, as a factual matter not what the agency actually did. One is the sort of abstract argument that that's not what an agency in this situation would do, and the other involves three or maybe four record cites to show that that's not supported in this record as an accurate portrayal of what this agency did in this decision-making process.

The second argument you make is that the record doesn't really adequately, I guess, in your view, even support

the punch line; that is, the agency's argument here depends on them saying threatened not endangered, and you're saying that the record doesn't even really support the agency ever really saying that in any accurate and meaningful way, right?

MR. GLITZENSTEIN: That's correct, Your Honor.

THE COURT: Thank you.

Your response?

MR. YANG: Good afternoon, Your Honor.

If I may, with regards to the first point on the DPS policy that was raised, counsel has pointed to the example of DPS policy and the services analysis under the DPS policy.

THE COURT: I'm going to pause you there for a moment.

MR. YANG: I'm sorry.

THE COURT: So you've moved from a microphone that is working to one that isn't working. Let's see if we can fix that. You don't need to do anything. Just hang tight for a second.

(There is a pause in the proceedings.)

THE COURT: Actually, let me just ask you to go ahead and take your seat, then we'll all be able to hear you better if you do.

MR. YANG: Certainly.

THE COURT: Go ahead.

MR. YANG: Your Honor, with regard to that analogy,

I'd suggest that there are some limitations how far you can extend that analogy. And so to your question with regards to whether the service has, in fact, taken that sort of approach before, certainly it may not be the most fashion-forward approach, but there's nothing that precludes the agency from taking a belt-and-suspenders approach, as it did here.

In our briefing, for example, we have cited a case on page -- in our reply brief, *Center for Biological Diversity v. Jewell*. The citation is 2014 Westlaw 5703029. And that is also a case that involved the application of the DPS policy, and in that case the service made a negative finding as to discreteness, and also made a negative finding as to significance. Notwithstanding that fact, it still continued and -- with this belt-and-suspenders approach and --

THE COURT: Let me start by giving you that point, at least for argument purposes, that an agency could do both and that I don't know on this record whether there's some sort of custom or practice that makes it unlikely that you did do both here. Let's just assume that you could do both.

So the real question becomes then factual, based on this record, is that what you actually did here, is that what your client did here. And you heard the three or four citations to the record suggesting that it's not what you did here. What's your response to that?

MR. YANG: Your Honor, I think a plain language

reading of the SPR analysis compels the conclusion that the focus of the agency was on the status prong and not on the significance prong. For example, if we take a look at the Final Rule and the SPR analysis, you'll see that almost the entirety of the analysis is focused on the status prong. The two sentences, the totality of the analysis on the significance prong is two sentences, which again we believe underscores the notion that the service, out of an abundance of caution, addressed the second prong, but it wasn't required to do so because it had already made the threatened finding on the status prong.

THE COURT: And that's in the final analysis?

MR. YANG: It is, Your Honor.

THE COURT: What do you make of the idea that in the draft analysis it came out differently?

MR. YANG: Certainly, Your Honor. If I may as well, too, before leaving this point, I should also point out we've made the argument in our briefing that we also believe the plain language reading of the one particular sentence in the analysis that really seems to be the crux of the dispute also compels the conclusion that we made a threatened finding.

So the terms are cast in a forward-looking sense, likely to become extinct within the foreseeable future. So we believe that's another point that weighs in favor of the conclusion that the agency made, in fact, to make a decision

based primarily on the status prong. And, again, I will, in a surfeit of caution, address the status prong as well.

To your question regarding the draft --

THE COURT: So I want to make sure I understand. You're also arguing then that you did, in fact -- your client did, in fact, recite appropriate language for finding the species threatened and not endangered, because you are facing the argument that the analysis on the status prong, certainly several sentences of it sound like a description of an endangered species.

MR. YANG: We'd suggest, Your Honor, that the opposite is true. If I may.

You know, for example, the service was careful to explain that the Washington population was only likely to continue trending towards extinction, and that that risk wasn't imminent but rather would occur within the century. These are the sort of forward-looking terms that we're referring to, which in our view speak to a future risk rather than a present risk.

So we believe that the plain language reading of the sentence actually compels the conclusion that this was a threatened status finding.

THE COURT: Thank you.

So one of your arguments is that to the argument that you came out differently in the draft than the final and its

corollary, that that indicates that you really analyzed significance on its own and not just as some add on. You respond that the landscape changed in the 18 months between the draft and the final.

First, do you agree that the draft analysis comes out differently than the final analysis?

MR. YANG: Your Honor --

THE COURT: On the question of status.

MR. YANG: We'd certainly agree that the draft, insofar as it goes, does suggest a different outcome, but I would attach several caveats to that.

THE COURT: Before we get to the caveats, what you want to make of that is that there's a reason why it came out differently in the final, and that is that the agency learned things it did not know when it issued the draft analysis, right?

MR. YANG: That's correct, Your Honor.

THE COURT: What are those things?

MR. YANG: So, if I may, you refer to the Pearson study, and Scott Pearson's acknowledgment prior to this draft telling you that, in fact, the data from the Pearson study, as well as two additional studies, may not be representative of current conditions.

So in that same email, which appears at SHL-26117 and 26118, Dr. Pearson points out that while the population has

declined on certain sites, it's actually increased on others, which in his view may reflect the movement of birds from Damon and Midway/Grayland to Leadbetter and not just a population decline.

So there was, Your Honor, some question about what this meant.

THE COURT: Let's start with that email, then. That's issued, if I remember correctly, a month prior to the draft analysis?

MR. YANG: Roughly a month before the draft analysis.

THE COURT: So, again, sort of post hoc ergo propter hoc, how do you get from a month prior to the draft analysis being an email that is new information postdating the draft analysis?

MR. YANG: Well, Your Honor, I think this is where we get to the point of discussing the caveat. So this draft finding wasn't meant to encapsulate the totality of the agency's knowledge at that point in time. Rather, as the transmittal email itself clearly said, it was really an effort to, in the language of the author, dump a raw --

THE COURT: Your argument depends upon new information being learned by the agency after the draft analysis, right?

MR. YANG: That's correct, Your Honor.

THE COURT: So is this email, which was issued a

month prior to the draft analysis, something you contend qualifies as new information not taken into account in the draft analysis?

MR. YANG: Your Honor, I think, if I'm understanding you correctly, Dr. Pearson raised the issue a month prior to the draft finding. The service requires time to collect the information, to suss out then whether this, in fact, was correct or not, whether that 40 percent decline rate was, in fact, accurate, or whether it may reflect something else; for example, the movement from one site to the other.

THE COURT: The agency, when it issued its draft analysis, knew of this email but felt like it hadn't had an opportunity to do its due diligence?

MR. YANG: It was aware of the email. It did predate this. But again --

THE COURT: Let's stick with it for a minute before you move on.

So it knew of the email but felt it had to do something more to, as you say, suss out its significance, right?

MR. YANG: That's correct, Your Honor, right.

THE COURT: So what did the agency on this record do following the draft and before the final to suss out the significance of this email?

MR. YANG: Well, it examined the survey data from

ODFW from 2008 to 2012. It examined the monitoring data for the very large population centers in the Willamette Valley. So there were data points that the agency was aware of but hadn't yet fully considered until it had that moment to do so.

This draft finding was really just meant to -- again, it was not meant to encapsulate the totality of the agency's knowledge at the time. It was simply --

THE COURT: No one has ever argued that it is entitled to encapsulate the totality of the agency's knowledge at the time. So you don't have to knock that argument down.

I thought that when you said there were a number of things that changed between the draft analysis and the final, that you'd have a list of things that the agency learned in that interim.

So it turns out this email, understandably, is not one of them, right? It's not something new that you learned in that 18-month interregnum, right?

MR. YANG: It predated the draft, so the service was aware of it at the time they drafted the finding.

THE COURT: So what did the agency acquire by way of knowledge that's demonstrated on this record that it didn't have when it issued the draft analysis, sufficient to change its mind?

MR. YANG: Your Honor, I would suggest it had a chance to fully digest the information. This was a -- again, I

believe at that point a raw piece of writing a month after it received this email. It did not yet have the full quantum of information that it had after it had collected the information and the data points from all the different --

THE COURT: There's two things going on. One is acquiring the full quantum of information, and the other is figuring out what the information says.

So the first is a gathering process. Did the agency gather any new information after the draft?

MR. YANG: Yes, Your Honor.

THE COURT: What?

MR. YANG: You know, I don't know offhand what specifically it was --

THE COURT: But the main thing you want to say is that the agency took that time to examine what it had acquired to understand its significance, right?

MR. YANG: Well, Your Honor, just to continue the chronology, the proposed rule didn't come out until October of 2012, and that included the request for comments. So forgive me if I'm misunderstanding your question, but I just want to make sure I'm clear as to the chronology. The service then, in October of 2012, asked for additional information, so --

THE COURT: Right, I understand. So this set of data points is being used in an unusual way. The argument is -- so typically the agency has every right to examine things and

think about them between a draft and a final, and should and does. That's very common.

Here the argument is that you're saying as a point of fact that the status decision was made in such a way as to make unnecessary a decision about significance that you went on in a belt-and-suspenders approach and did so anyway, but the fact that that relied on a bad draft rule doesn't matter because standing independent of all that is your status decision, and that's your argument.

And the response to that is, well, there are some data points that indicate that that's not the way this happened, and one such data point is the fact that the draft analysis comes out differently on status.

And your response to that is, well, it comes out differently because we learned things in the interim.

So all I'm trying to get at is given that your argument is that you learned things in the interim, you didn't tell me in your brief what those things are. Now I'm trying to give you a chance to tell me what they are to support the idea that you came out differently later, not as a cover but as a bona fide change of mind.

MR. YANG: I understand, Your Honor. And perhaps what I'm trying to inartfully explain is that after the draft finding, the service was able to undertake a more extensive review of this information of Pearson, of Camfield, of

Schapaugh, and it did so. It did a deeper dive into this information.

So I think your question suggests that perhaps the service became aware of additional data points that might be countervailing and such. I think this shows in the SPR analysis -- and I'm looking at SHL-00632 -- that in fact what the agency had an opportunity to do after they proposed the rule was take a deeper dive into this information.

THE COURT: Right. And I don't mean to suggest that there's anything wrong with simply relying on the idea that you use the period of time to assimilate what you've learned by way of information. I'm just trying to verify that there, in fact, are no newly acquired data points in that 18-month period, it's all about data previously acquired being better understood.

That's your position, right?

MR. YANG: Yes, Your Honor.

THE COURT: And when you say the landscape changed between the draft and the final, you mean that the agency did a deeper dive and came to, in its view, a better, clearer understanding of what the data means?

MR. YANG: Well, let me suggest, Your Honor, that sometimes the dog that didn't bark is just as telling as the dog that did, and the fact that in response to the proposed rule, it asked for information and the information did not come up during that review process that would suggest that the

Washington population was more imperiled.

THE COURT: All right. So there are a couple of other factual reasons, factual arguments why -- or why plaintiffs contend that the argument you've set up isn't how it really happened here, and another one to pick up is this idea that on a related analysis, when presented with the opportunity, I suppose, to engage in a belt-and-suspenders approach, the agency declined to even do so.

Why isn't that persuasive to the point that the agency wouldn't have gone on to analyze significance if it made the status finding it made here?

MR. YANG: Your Honor, there's I think no dispute that the agency certainly could have been a bit more crystalline in its reasoning, and so there's no dispute from our end that it could have taken a belt-and-suspenders approach as to DPS, but it did not. But that's certainly different than saying we're somehow barred from doing that with regard to the SPR policy. We've already pointed out one case in which the service has, in fact, taken a belt-and-suspenders approach to the DPS policy, so there is at least some precedent for the agency doing that.

With regards to the SPR policy itself, this was a time during which that particular policy was very much in development and underway. So it was a draft policy succeeded by a final policy, and so I think what you see here, Your

Honor, is an agency that is grappling with some very thorny issues of policy and law. And so in this instance, I think that the chronology is important because it suggests that, again, out of a surfeit of caution, the agency determined that the most prudent course of action would be to address both.

THE COURT: All right. Thank you very much.

Any brief reply on this point before we move on to Rule 4(d)?

MR. GLITZENSTEIN: Yes, Your Honor. Thank you for the time.

Just a couple of points. In terms of the email, even putting aside the chronology, I think it's important to point out that Pearson is with the Washington Department of Fish and Wildlife. They submitted comments on the draft policy, and if you look at their technical comments -- and these are Administrative Record 15585 through 586 -- there was no suggestion whatsoever that the situation had improved somehow in Washington. In fact, they say things which are supportive of the dire condition in Washington.

For example, on 15585, they say, "The summary should cite importance of stochastic weather on small populations as threats. Both are significant threats that can drive populations to extinction over very short periods."

On the next page they talk, as they -- as the proposed rule did, about the dire problem with small

populations facing a genetic bottleneck and the low survival of chicks for a very small population.

So if you look at that, which are the formal comments submitted by the agency that Pearson worked for, it undercuts that argument.

Secondly, if you look at the studies that were cited in the Final Rule, Your Honor, not only is there no reference to the situation improving in Washington, which would be consistent with this reanalysis that government counsel is suggesting, in fact the studies cited in the Final Rule discussion of the SPR portion of the rule are the same studies that were cited in the draft rule. They're the studies showing 40 percent decline over a very short period of time for birds reduced to 200, 300 animals in the population.

THE COURT: Let me back up just a minute, then. I understand that point. Let me back up just a bit.

So the agency has two independent grounds on which it can make this decision, right, status or significance? And they don't need both, they just need one, correct, typically?

MR. GLITZENSTEIN: Yes, Your Honor.

THE COURT: They can either not make a finding on significance, or they can make an incorrect finding on significance if they're right about status. It doesn't matter in a typical case, right?

MR. GLITZENSTEIN: Yes, Your Honor.

THE COURT: And your argument here is that, well, first of all, if we first give them for sake of argument the idea that they have made a finding on status that's threatened only, and if that's correct, then all of your arguments about significance don't really matter, right?

MR. GLITZENSTEIN: They don't matter for the SPR portion of our argument, that's correct.

THE COURT: So the reason you're suggesting that that's -- that the way this played out was that the agency first decided the question of status sort of in your favor, if we can say that, and then went on to decide significance, the goal that you have to have, the advocacy goal is to suggest that anything later done by the agency to advance the idea that these are two independent findings is a post hoc rationalization for what's really happening here?

MR. GLITZENSTEIN: That's exactly what it is, Your Honor. I give government counsel points for creativity, but I don't think it's consistent with what they actually did.

And, again, if you look at that last paragraph I quoted before, which government counsel has not responded to, it says, "Therefore" -- after discussing the relative status of the two portions of the range, "Therefore we conclude that we do not need to list as endangered," and the "therefore" is the crucial part of this case. This was not a toss it. This was the conclusion for why it should not be listed as endangered

based upon a significant portion of the range.

Your Honor, I think the other point here that becomes I hope clear from the exchanges that have occurred is that there is no way, consistent with the case law, that at the very least there should not be a remand for more coherent explanation and decision making. In *Gifford Pinchot*, the Ninth Circuit said the following --

THE COURT: I'm sorry, let me ask. You said the very least. But isn't that also what you're asking for here?

MR. GLITZENSTEIN: Yes, Your Honor. I guess there's two different kinds of remands. So I apologize for being unclear about that. The basic relief is a remand. I think that a remand could obviously take the form of, on the one hand, we don't understand what the government is saying, they claim now they made a threatened finding, I don't see that in this decision document, I remand for the agency to explain better.

And then, of course, there's also a remand in which the Court could go further than that -- which we think is supported by the record -- that in so many words the agency depicted this as an endangered population, which on its face would support a conclusion that if it's significant, the species has to be listed.

So all I was trying to suggest is there's remands which ask for better explanation and there's remands which

obviously delve more into the record. And all I was saying was that under *Gifford Pinchot*, where the Court said you can only invoke this rule of prejudicial or harmless error -- which is what the government is asking the Court to do -- is when, quote, a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substantive decision reached.

My colleague specifically said that the agency's analysis was not crystalline. I would say that the discussion today highlights that, on this record, the Court cannot confidently, I respectfully submit, conclude that the invocation of an illegal significance test clearly had no bearing on the outcome of the agency's decision-making process. And I believe if you apply that standard to the record, then there has to be a remand for a further analysis on that issue.

THE COURT: Thank you.

Mr. Kerin, will you let the parties know if I can get shorter answers to these questions, we'll be about ten more minutes?

MR. KERIN: I will, Your Honor. Thank you.

THE COURT: Let's turn to 4(d).

So first, assume you're right about remand in one form or another. Does that necessarily -- what does that do to Rule 4(d)? Does it void Rule 4(d) and require it to be redone when everything else is redone? In this case there's really no

status quo ante to return to except nothing, right? So in your view, if you win on some form of remand, does that have a necessary impact on your Rule 4(d) argument?

MR. GLITZENSTEIN: Yes, Your Honor. I think it certainly counsels in favor of also remanding the 4(d) rule, because the 4(d) rule is contingent upon there being a threatened determination.

THE COURT: You'd have to -- you, the agency, would have to analyze it differently if the status were different?

MR. GLITZENSTEIN: That's correct, Your Honor.

THE COURT: And then if Rule 4(d) goes away in the interim, then what? What is the interim? Nothing?

MR. GLITZENSTEIN: Well, the interim from the 4(d) standpoint would be that the normal protections of the act would come into play, which does not mean that --

THE COURT: Which those were in place before this litigation even began, right?

MR. GLITZENSTEIN: Well, not the protection of ESA. We're asking the threatened listing be remanded but not vacated so the species would continue to be listed as threatened.

THE COURT: And with what -- if the rule, if the 4(d) rule is voided, then with what specific protections? Just no -- let's just talk about the only one you challenged, no agricultural exemption to the other protections from being threatened.

MR. GLITZENSTEIN: That's right, Your Honor. The baseline condition right now is that there's a general 4(d) rule that the Fish and Wildlife Services uses as sort of the baseline condition. That is that normally a threatened species gets the protections of an endangered species from take, the take prohibition, except where a special rule has been adopted.

So if the 4(d) rule were vacated, then we would simply return to the same situation that applies to most threatened species, which is again the baseline conditions. And that doesn't mean that all take would necessarily be prohibited. There are other mechanisms in the Endangered Species Act, the ones that are usually used in order to allow certain levels of take.

So, for example --

THE COURT: That's all right. Thank you. I'm aware of those. Thank you.

MR. GLITZENSTEIN: So that we believe that --

THE COURT: That's all I want to hear. Thank you very much.

MR. GLITZENSTEIN: Thank you, Your Honor.

THE COURT: Same question, then. Assume for a moment then that this is remanded. Then what happens to the 4(d) rule in this case?

MR. YANG: Your Honor, we believe the critical wrinkle would be plaintiffs have requested as to the listing

decision, it would be remanded without waiver. So the effect then would be to leave the subspecies as threatened pending the agency's final position on remand.

So, in our view, Your Honor, as we tried to demonstrate in the briefing, the exemption of those agricultural activities supports lark habitat, ultimately provides a net conservation benefit to the subspecies. So, in our view, it would actually be prudent if the threatened listing is -- remains in place during remand, that the 4(d) rule also remain in place, again for the purpose of providing that conservation benefit to the subspecies.

THE COURT: Your response to that?

MR. GLITZENSTEIN: Our response, Your Honor, is that the agency specifically made a finding that the existing protections in the Willamette Valley are inadequate to protect the species. As we spell out in our briefs, they listed the species on that basis, and therefore keeping that 4(d) rule in place with no protection for the species would actually be contrary to the purposes of the act. So while they're revisiting listing, we believe they should also be revisiting the 4(d) rule and rely on other mechanisms.

THE COURT: The argument is not that they wouldn't revisit the 4(d) rule, it's just that it wouldn't be vacated. So they'd have to revisit it necessarily, but it would just -- it wouldn't be vacated in the interim.

MR. GLITZENSTEIN: I think Your Honor has the discretion to remand and not vacate the 4(d) rule, especially if a court in this hypothetical were to put the agency on a pretty fast track for a new decision.

Your Honor clearly has the discretion to do that. We believe the better course from the standpoint of the purposes of the act would also be to vacate the 4(d) rule, because again they found that -- they found in listing the species that the Oregon state protections were inadequate to protect the species, and that is what is -- essentially the 4(d) rule does. It adds nothing to the existing state protections.

But we acknowledge that Your Honor would have the discretion to only remand the 4(d) rule, but if Your Honor were to do so, we think there should be some separate -- some separate briefing or at least discussion about what the schedule for a new decision would be so the lark is not basically kept in an unprotected state indefinitely, especially if the ultimate decision is going to be an endangered listing, which would be a possible outcome.

THE COURT: Thank you.

I appreciate, as I said at the outset -- and I mean this sincerely -- the helpful briefing in this case. This was sort of above the norm in cases, not just environmental but generally here. So you're to be commended for that --

MR. GLITZENSTEIN: Thank you, Your Honor.

THE COURT: -- for the helpful oral argument here.

As I laid out at the outset, there are really these two claims as ways in which the agency's actions are said to have been arbitrary and capricious. And as to the first one, two subparts for throughout the range and a portion of the range.

And we've sort of left to one side what I view as plaintiff's weaker argument about throughout the range for its stronger argument that the agency decision here was, in fact, arbitrary and capricious, and in the decision it made regarding risk and status -- excuse me, status and significance on a significant portion of the range.

And that argument depends on something a little bit unusual for a plaintiff to show, which is that while there are two independent grounds by which the agency can -- on which the agency can rest its decision, either one of which is sufficient on its own, and that one of those is the one claimed by the agency here, that I ought to view that as a post hoc rationalization that doesn't match the record here. It doesn't adequately take into account what the record shows about what the agency actually did, and that the record shows what the agency actually did is to first decide that there is -- that the species is either -- well, I'll just say endangered, and then to go on to reach its decision on whether this was a significant portion of the range.

And what happened after that is one of two things: either an inadequate statement of this independent ground of finding not in danger, or a post hoc rationalization, which going on to find nonsignificance is really just meant to -- excuse me, to find threatened only is meant to buttress a weak finding, made weak by an improper draft rule on the significance question.

I fundamentally agree with that argument by plaintiff here. I agree that the record does not really adequately support the idea that this finding of being threatened only is what the agency intended to do all along without -- well, I agree that it's a post hoc rationalization for what really happened here, and that while the agency certainly, like any other agency, is free to change its mind between a draft analysis and a final analysis, there are several points along the way that suggest that that's not a correct explanation of what happened here.

I suppose, more fundamentally, I agree that the agency's explanation for how it reached this final point is murky enough, unclear on this record enough to make it inadequate to be supportable under the Endangered Species Act, and so I remand for further analysis on both prongs; that is, an analysis of the significance of the portion of the range without reliance on the draft rule, and an analysis -- or at least a clearer explanation of what the agency is relying on in

determining that the species is only threatened. And that requires me -- or allows me not to reach the other question, so I won't do so.

Then as to Rule 4(d), I agree fundamentally with the agency's argument that this is really an unusual situation in which industrial and agriculture activity create an inadvertent habitat for the species, and really almost turning on its head in some ways what would be the typical analysis here.

And it's true, it's axiomatic as a matter of economics that if you, as a farmer in the Willamette Valley, can grow grapes or grass and you make grass more expensive to grow, there will be some shift to grapes, but here on this record, we don't know much about that. We -- that's a generalizable proposition, but dependent on transactional costs and the inelasticity of demand that we don't know about here. There is a requisite factual undertaking to say how much cost in the face of how much demand will really drive growers out of grass into something else. And there's not enough to go on here to know that.

But it's sensible enough as an overall proposition, and the situation is unusual enough -- that is, that we require this agricultural activity to keep going in order to create the habitat, that I'm going to not vacate the 4(d) rule in this place with regard to agriculture. It's not challenged on any of the other exceptions, and therefore leave it in place until

the reanalysis takes place. which I will then invite the parties to submit within one week's time a schedule going forward that would allow that situation to stay in place for the minimum reasonable period possible, in light of the fact that the status of the species could theoretically change from threatened to endangered during the reanalysis.

Anything further from plaintiff today?

MR. GLITZENSTEIN: No, Your Honor.

Just so I understand, you are intending -- so we will have a discussion about a schedule and hopefully come up with some agreement with that. We'll endeavor to do that.

You remanding the 4(d) rule as well as the listing decision?

THE COURT: Yes.

MR. GLITZENSTEIN: Thank you, Your Honor.

THE COURT: And you'll do your best to come up with a proposed schedule, but if you don't agree, then just submit your disagreeing proposals.

MR. GLITZENSTEIN: Yes, Your Honor. Is there a time frame within which you'd like us to do that?

THE COURT: I said in one week from today.

MR. GLITZENSTEIN: I'm sorry. Thank you, Your Honor.

THE COURT: For defendants, anything further?

MR. YANG: Nothing, Your Honor.

THE COURT: For intervenors?

MS. LOBDELL: We'll take your hint, Your Honor.

THE COURT: Pardon me?

MS. LOBDELL: We'll take your hint, Your Honor. Nothing further.

THE COURT: Thank you. We'll be in recess.

THE CLERK: Court is in recess.

(Proceedings concluded at 2:16 p.m.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway *July 9, 2019*

BONITA J. SHUMWAY, CSR, RMR, CRR DATE
Official Court Reporter

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